Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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251 pp.

QUESTIONS PRESENTED

I

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state to fix a rate for utility service that is insufficient for the utility to meet even its approved operating expenses, thereby leaving the utility in an operational deficit?

II

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state, in the name of an asserted public policy, to sever a material pricing term in a utility contract, after the utility's performance and without providing any compensation for this taking?

III

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state selectively to deny a utility the right to enforce a contractual term when similarly situated utilities have been allowed to enforce similar terms, and when no basis is articulated for the difference in treatment?

LIST OF PARTIES

The petitioner below in the New Jersey Supreme Court, and appellant before the Superior Court of New Jersey, Appellate Division was Solid Waste Transfer & Recycling, Inc. ("SWTR"). SWTR is the petitioner before this Court. SWTR has no parent or subsidiary affiliations.

The respondents below were the State of New Jersey, Department of Environmental Protection ("DEP"), the successor in this matter to the State of New Jersey Board of Public Utilities ("BPU"), the County of Essex, New Jersey ("Essex" or the "County"), the City of Newark, New Jersey ("Newark"), the New Jersey Department of the Public Advocate, Division of Rate Counsel, now known as the Division of the Ratepayer Advocate ("Rate Counsel"), and Waste Management of New Jersey ("Waste Management"). Waste Management was also a petitioner to the Supreme Court of New Jersey and an appellant in a consolidated appeal before the Appellate Division.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

Petitioner Solid Waste Transfer & Recycling, Inc. ("SWTR" or the "Petitioners") respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), which affirmed orders of the State of New Jersey, Department of Environmental Protection ("DEP") and Board of Public Utilities ("BPU"), the DEP's regulatory predecessor in this matter. The DEP and BPU orders denied SWTR, a solid waste transfer station deemed to be a public utility subject to the rate-making authority of the DEP, a rate sufficient for

SWTR to meet its approved operating expenses. The state thereby set a rate confiscatory of SWTR's property rights protected by the United States Constitution. Petitioner filed a timely petition for certification with the New Jersey Supreme Court seeking review of the Appellate Division's decision. The New Jersey Supreme Court denied certification in an order issued on September 4, 1997 and entered on September 8, 1997.

OPINIONS BELOW

The September 8, 1997 order of the New Jersey Supreme Court denying SWTR's petition for certification is unreported and is reproduced herein as Appendix "A." The April 10, 1997 decision and judgment of the Appellate Division is reported at 299 N.J.Super. 577, 691 A.2d 846 (1997) and is reproduced herein as Appendix "B." The August 19, 1994 order of the DEP, on motion for reconsideration from the August 8, 1991 order of the BPU, is unreported and is reproduced herein as Appendix "C." The August 8, 1991 order of the BPU, the DEP's predecessor in this matter, modifying the initial decision of the State of New Jersey Office of Administrative Law ("OAL"), is unreported and is annexed hereto as Appendix "D." The December 31, 1990 initial decision of the OAL is unreported and is annexed hereto as Appendix "E."

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the April 10, 1997 judgment of the Appellate Division is invoked under Title 28 of the United States Code, Section 1257(a). This Petition for Certiorari is timely filed as it is filed on Monday, December 8, 1997, the first business day after Sunday, December 7, 1997, which was the ninetieth day after September 8, 1997. On September 8, 1997, the New Jersey Supreme Court entered its order denying SWTR's petition for certification from the decision of the Appellate Division. *See* Rules of the Supreme Court of the United States, Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In 1986, a small group of investors formed SWTR and committed significant amounts of personal funds to its operation. This case is about how the State of New Jersey, through an unconstitutional exercise of its regulatory rate-making authority, confiscated their monies.

SWTR is a solid waste transfer station located in Newark, New Jersey. (60a). A transfer station is a local solid waste collection facility to which municipal haulers bring waste, which is then separated by the transfer station into various waste categories and prepared for long-haul shipping to an out-of-state landfill. (74a). Four individuals, Mark Mauriello, Dr. Joseph Mauriello, Harold Martin, and Patrick Giordano, formed SWTR throughout late 1986 and early 1987 in response to a solid waste crisis faced by Essex County. (207a). A state court had ordered that Essex cease using the Hackensack Meadowlands landfills no later than July 31, 1987. (73a). The County sought an emergency solution to this crisis, since it had no place to take its municipal waste and its planned resource recovery facility would not be operational until September 1, 1990, at the earliest. (4a). It proposed, as its interim solution, the construction of solid waste transfer stations. (4a).

SWTR's investors negotiated with the County for a contract, which they received on July 1, 1987. (108a). In order to win this contract, SWTR had to best seven other prospective vendors. (24a). The SWTR/Essex contract contained a fixed-price for SWTR's services, subject to annual adjustments linked to the Consumer Price Index ("CPI"). After they received a contract, and in reliance on the contract, SWTR's investors committed approximately $3.5 million in personal funds to the project and authorized the immediate construction of a building and facility. (114-115a; 207-207a). SWTR, through the perserverence and efforts of its investors, was ready a mere month later to accept 2,600 tons of solid waste every day, alleviating the County's solid waste crisis.

After all this was done, the State announced that the County was not bound by contract rates, and approved rates that failed to return to SWTR's investors their principal, let alone profit. The state approved SWTR's base rate, but did not approve the CPI-adjusted rates billed for 1988-89 and 1989-90, leaving SWTR in an operational deficit. (210a). The State of New Jersey thereby permitted the County to confiscate SWTR's investment in the name of the "public good." In 1991, four years after SWTR began providing service, the

state rejected the rates billed by SWTR and relieved the County of the obligation to pay them. (52a). The state intentionally left SWTR with an operational deficit of over $2,000,000, an enormous loss for SWTR's investors to absorb. (210a).

SWTR's rates, even if adjusted in accordance with the CPI, were the lowest rates in New Jersey for comprehensive transfer station services. (131-133a).[1] The state approved rates significantly higher, along with automatic annual increases, for other transfer stations in New Jersey. (131-133a). In Essex County, however, the County's authorization of the transfer station program angered the City of Newark, its largest municipality, and the issue became political. After Newark failed to stop the construction of the transfer stations through litigation, *see City of Newark v. Essex County Board of Chosen Freeholders*, 221 N.J.Super. 558, 535 A.2d 517 (App. Div. 1987), *app. dismissed*, 114 N.J. 301, 554 A.2d 854 (1988), it intervened in the proceedings below seeking state regulators to reject the SWTR contract,[2] infusing politics into this case.

The State of New Jersey violated the United States Constitution in the manner by which it regulated SWTR's rates. The state reviewed and approved SWTR's expense structure

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[1] The Essex County tipping fee for Type 10 waste was $102.15 per ton, the lowest in the state for comprehensive transfer station services. The tipping fees for two counties, Mercer and Passaic, did not include disposal costs. (131-133a). The Essex rates were therefore the lowest in the state for "comprehensive" services. *Id.*

[2] Newark's political lobbying eventually prevailed within the County. Essex, as a party to the contract, was obligated to seek the BPU's approval. It filed a petition with the BPU for acceptance of the contract, and the matter proceeded under the caption *In the Matter of the Petition of Essex County*. During these proceedings, Essex switched sides, *after receiving SWTR's performance*, and adopted Newark's position that the CPI-adjusters should not be enforced. This type of conduct by public officials must be condemned by this Court.

Essex's petition has been denied, but it will nonetheless appear before this Court and argue that its petition was properly denied.

in its entirety (52-55a), which means that SWTR did not mismanage itself into deficit. But then the state fixed rates that were demonstrably insufficient for SWTR to pay even these approved expenses. Without adequate revenues to cover its costs of operation, SWTR's investment was forfeited. The Constitution cannot condone the result: SWTR was left in deficit simply for paying for approved expenses, and the state thus compelled its four investors to subsidize the County's costs for transfer station services.[3]

SWTR arrives at this Court to request that it remedy this injustice. The regulators and courts below have flatly ignored, without response, SWTR's constitutional arguments. Their holdings were made in open defiance of this Court's precedent. With nowhere left to go, SWTR comes to this Court to vindicate its constitutional rights.

B. SWTR'S ARGUMENTS AND THEIR TREATMENT BELOW

At all levels of review of this matter, SWTR has argued that its property rights have been unconstitutionally infringed. Neither the regulators nor the courts have addressed these arguments in any of their written decisions.

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[3] The BPU order is a contradiction in itself. In one breath, the BPU stated, falsely, that SWTR limited its case to proofs suggesting that because its contract was competitively procured, it should be approved (52a). But the BPU then turned around and discussed SWTR's cost-of-service proofs.

The respondents in their arguments below repeated time and again that SWTR argued only that its contract was competitively procured, and that it did not place into evidence any other proofs. The respondents have misled every tribunal they have been before. SWTR produced a full cost-of-service case, and corroborated the reasonableness of its competitively procured rates by a cost-of-service analysis. The Administrative Law Judge, in upholding the SWTR contract in its entirety, ruled that SWTR's rates were reasonable from a competitive market analysis, a cost-of-service analysis, and from a comparable rate analysis. (181a: 192a; *see* 205a).

SWTR argued in the Appellate Division, repeating the arguments made before the BPU and DEP, that it "was denied its constitutional and statutory rights to a fair projected return in violation of its constitutional rights to procedural and substantive due process." (SWTR Appeal Brief, July 7, 1995, pp.38-41). It argued that it had been unconstitutionally left in an operational deficit, and that it could not be legally regulated into deficit. (*Id.*). The BPU and DEP never addressed this argument or considered the constitutional problems with its proposed regulation. The Appellate Division did not address SWTR's position, avoiding the issue altogether with the remarkably incorrect observation that SWTR did not "urge that [its] financial health has been jeopardized by the Board's action or by the DEPE in rejecting the CPI-based automatic increases." (A-24).

Within the context of its due process objections, SWTR argued that it further offended the constitution for the state to deprive "SWTR, on a retroactive basis, of the benefit of a material and non-severable [pricing] term negotiated in good faith and in consideration for SWTR's acceptance of this risks evident in the agreement." (SWTR Appeal Brief, July 7, 1995, p.39). SWTR argued that to sever the pricing term defeated the value of the contract, and if the regulators were to sever the CPI-pricing terms, then they must otherwise act to compensate SWTR for this taking. These same arguments were made to the BPU and DEP. Neither the regulators nor the courts addressed these arguments in their written decisions. They simply took the CPI-pricing terms away, after performance and without compensation.

SWTR also argued to the BPU, DEP, and Appellate Division that the state violated its due process rights by enforcing an asserted public policy barring enforcement of inflation-linked contractual adjustments selectively against SWTR. It argued that "contract utilities such as SWTR have routinely enforced their contractual CPI or other inflationary increases without question by the regulators." (SWTR Appeal Brief, July 7, 1995, p. 28). In New Jersey, there has never been any policy barring enforcement of inflation-linked adjustment

clauses in utility contracts. The parties will be speechless before this Court to cite even one other example, prior or subsequent, where the asserted policy against CPI-linked adjusters in a utility contract has been enforced. The Appellate Division declined to consider the constitutional dimensions of this problem, writing that "[r]eliance by . . . SWTR on other instances where CPI-based automatic escalators have been allowed is not persuasive" and that "[e]ach case must rest upon its own peculiar facts." (A-22). The Appellate Division's cursory treatment of SWTR's argument provided no clue as to what "peculiar facts" or rational basis justified excision of SWTR's pricing terms when other vendors have been allowed to enforce similar terms.

REASONS FOR GRANTING THE WRIT

I

THE STATE'S REGULATION OF SWTR IS UNCONSTITUTIONAL IN THAT IT PRACTICALLY DEPRIVED SWTR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

Long ago this Court cautioned that the power to regulate is not the power to destroy. *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886). The "guiding principle" of utility regulation is that a utility commission is constitutionally prohibited from setting a rate for service that is confiscatory of the utility's property rights. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *In re Instrastate Industrial Sand Rates*, 66 N.J. 12, 23-24, 327 A.2d 427 (1974), *citing*, *Great Northern Railroad Co. v. State of Washington*, 300 U.S. 154 (1936). "A rate is too low if it so 'unjust as to destroy the value of the property for which it was acquired' and in doing so 'practically deprive[s] the owner of the property without due process of law.'" *Duquesne Light*, 488 U.S. at 307-08, *quoting*, *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896). In order to meet constitutional requirements, a utility commission must provide for a return sufficient to "(1) assure confidence in the financial soundness of the utility; (2) maintain and support the

utility's credit; (3) enable the company to attract capital necessary to provide service; and (4) maintain the integrity of existing service." *Petition of Elizabethtown Water Co.*, 107 N.J. 440, 453-454, 527 A.2d 354 (1987), *citing*, *Bluefield Water Works & Improvement Co. v. Public Service Commissioner of West Virginia*, 262 U.S. 679, 693 (1923). Where "the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light*, 488 U.S. at 308.

The state regulated SWTR without regard to these constitutional precepts. A thorough review of the regulatory orders and the Appellate Division decision reveals that none of these tribunals concerned themselves in the least with the financial repercussions of their excision of the CPI provisions from the SWTR contract. In fact, the only comment along the way that pertained to SWTR's financial health was the Appellate Division's remarkable claim that SWTR did not urge financial injury, an observation made in a vacuum given the enormous amount of *undisputed* evidence of SWTR's financial harm and the passion of its constitutional arguments. SWTR respectfully submits that the state's right to regulate utility rates invokes not only a duty to protect the public, but a responsibility to protect the utility as well. The regulation here is all one sided. No hint of concern for SWTR's financial health is found in any of the decisions under review.

A. SWTR OPERATED IN A DEFICIT

That SWTR operated in a deficit is undisputed by the parties. SWTR produced its accountant, Dr. Joseph Mauriello, a prominent accountant and a full professor retired from the faculties of the New York University and Seton Hall University business schools, to testify as to SWTR's financial health. (212a). He testified that, from the outset, the extreme risk inherent in the SWTR contract was evident to commercial lenders and banks, which refused to lend SWTR the capital necessary to initiate the project. (206a). Without the availability of these sources of capital, Dr. Mauriello secured

financing from private sources. (206a). He and Mark Mauriello personally financed the engineering, travel, and other expenses incurred by SWTR until it was capitalized through investment and personal loans made by the shareholders. By the end of June 1987, SWTR had incurred debt through private sources in the approximate amount of $2,000,000. (206a). SWTR agreed to repay principal with a $1.35 million payment by September 1, 1989, and additional $1.35 million payment by December 31, 1990, and $516,000 by the end of the project. (206-207a). The amount of principal to be repaid exceeded $2,000,000 because Joseph Mauriello loaned SWTR an additional $1.35 million in December 1987, and Mark Mauriello advanced an additional $170,000 on another loan. (206-207a). Therefore, investment in SWTR totalled well over $3.5 million.

At the time of the OAL hearings, Dr. Mauriello testified that SWTR needed additional revenue *before* depreciation of $2,722,569 prior to September 1, 1990 just to break even in its first three years. (210a). Also at the time of the OAL hearings, SWTR had billed for CPI increases in the amount of $3,427,493, exclusive of interest, which the County refused to pay. (50a). If SWTR were to be awarded those amounts, it would have shown a profit, before depreciation, of $704,924 for the first three years -- the difference between the CPI increases, as billed, and the $2,722,569 required to break even. This amounts to a profit of $234,974 per year to be split among its investors, and even less when depreciation is factored. Given an investment of $3,500,000, this amounts to an annual return, before depreciation, of less than seven percent, hardly a lucrative return in light of the risks associated with the investment.

Dr. Mauriello's opinion as to the financial injury suffered by SWTR was undisputed. No party disputed the fact of SWTR's deficit. SWTR served Dr. Mauriello's pre-filed testimony prior to the hearings and, as noted by the Administrative Law Judge, the parties were afforded full discovery of SWTR's financial records. (190-191a). No party countered Dr. Mauriello's opinion with contrary testimony, an implicit

concession of its accuracy. In assessing Dr. Mauriello's testimony, the Administrative Law Judge lauded his expertise, credibility, and forthrightness. (191a). While the parties have summarily argued in post-hearing submissions that Dr. Mauriello should be disbelieved, they offered, and continue to offer, nothing of evidentiary substance. They had a fair opportunity to be heard on SWTR's financial health, but could not find even a single accountant who would challenge Dr. Mauriello's testimony.

B. SWTR'S EXPENSES WERE APPROVED AS REASONABLE

Rather than confront Dr. Mauriello on SWTR's deficit, the parties sought to suggest that SWTR caused this injury through its maintenance of an unreasonable expense structure. They argued that SWTR was accordingly not entitled to rate relief. The parties specifically targeted SWTR's processing fees, rental costs, and transportation costs, suggesting that SWTR paid too much for each service. In her thorough opinion, the Administrative Law Judge carefully considered these arguments but ultimately concluded that SWTR's expenses were reasonable. (181-182a). The BPU and DEP affirmed these findings of the Administrative Law Judge, concluding that adjustments to SWTR's expenses were not warranted. (53-55a).

C. SWTR'S RATE IS CONFISCATORY

Based on the foregoing, it is beyond serious dispute that the state fixed a rate for SWTR that was insufficient to provide for its costs of service. SWTR respectfully submits that a rate that does not even cover a utility's approved expenses is confiscatory within the meaning of this Court's precedents. In fixing a rate so insufficient that SWTR could not even meet its approved expenses, the state neither assured confidence in the financial soundness of SWTR, nor maintained and supported SWTR's credit, nor enabled SWTR to attract capital necessary to provide service, nor maintained the integrity of SWTR's existing service. *Petition of Elizabethtown Water Co.*, 107 N.J. 440, 453-454 (1987), *citing*, *Bluefield Water*

Works & Improvement Co. v. Public Service Commissioner of West Virginia, 262 U.S. 679, 693 (1923). On all accounts the state failed to adhere to its constitutional obligations to SWTR. By definition, SWTR's rate, without collection of the billed CPI increases, was confiscatory.

II

THE STATE'S ELECTION TO SEVER A MATERIAL PRICING TERM AFTER PERFORMANCE AND WITHOUT PROVIDING ANY COMPENSATION FOR THIS TAKING IS UNCONSTITUTIONAL

On August 6, 1991, the BPU first held that the pricing terms of the SWTR contract could not be enforced because of an asserted policy barring the enforcement of inflation-linked adjusters in utility contracts in the absence of a proven nexus between the inflationary index and the cost components of the utility. (50-52a). Based on that asserted policy, the BPU excised the CPI clauses from the SWTR contract and relieved the County of its obligation to pay the CPI increases that SWTR had billed. SWTR submits, even if this policy were valid, the severance from a utility contract of a material pricing term that meant the difference between bare profitability and extreme deficit is unconstitutional where no compensation is given for the government taking. *See Duquesne Light*, 488 U.S. at 310, *quoting*, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("it is not theory but the impact of the rate order which counts").

Whatever ill may be associated by the state with inflation-linked escalators, the state's conduct in striking the clause without compensation is many times more prejudicial to the public interest that enforcement of the escalator clauses. In *Permian Basin Area Rates Cases*, 390 U.S. 747 *reh. den.* 392 U.S. 917 (1968), this Court acknowledged that, under familiar principles of contract law, an excision of a material pricing term from an agreement utterly destroys the value of the contract. *Id.*, at 783, *citing*, *I/M/O Pure Oil Co.*, 25 F.P.C. 383, 38 P.U.R.3d 125 (Fed. Power Commission 1961). This Court in *Permian Basin Area Rate Cases* discussed with approval

the Federal Power Commission's holding in *Pure Oil*, where the commission expressed concern with "infinite escalation clauses" but declined to strike clauses in existing contracts because "this would prove 'many times' more prejudicial to the public interest than would the escalation clauses." *Permian Basin Area Rate Cases*, 390 U.S. at 783, *citing*, *Pure Oil*, 25 F.P.C. at 388-89.[4]

In striking a clause that meant the difference between profitability and non-profitability, the state took property without compensation. The state could not sever the SWTR pricing terms unless it acted to compensate SWTR by readjusting the risk allocation of the contract to provide for relief for the injury that the severance created, because otherwise the effect of the rate order is confiscatory. *See Duquesne Light*, 488 U.S. at 310; *Hope Natural Gas*, 320 U.S. at 602. Although the SWTR pricing term was severed from the contract, neither the agencies nor the courts thereafter undertook any discussion as to how SWTR should be compensated for the governmental action causing destruction to the value of its contract and leaving SWTR in an operational deficit.

The prejudice to SWTR is even more acute since SWTR had already performed when the BPU, in 1991, acted to deny SWTR the benefit of its contract. By August 1991, SWTR had incurred enormous expense on behalf of the County that the BPU determined should go uncompensated in an opinion that demonstrated an outright hostility to the CPI adjusters. (50-51a). But on February 10, 1989, the BPU had written in

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[4] This Court in *Permian Basin Area Rate Cases* upheld the Commission's distinction between its action in *Pure Oil*, where it declined to destroy the value of existing contracts by severing a material pricing term that included automatic price escalators, and the case before it, where the Commission limited application of three-specific type of automatic escalators in intrastate gas contracts in the Permian Basin area so that in no event could a rate exceed the maximum rates the Commission had fixed. *Permian Basin Area Rate Cases*, 390 U.S. at 782. SWTR's case squarely fits within the parameter of *Pure Oil*, since this case involves a total excision, not limitation, of a material pricing term.

an interlocutory order in this case discussing the enforceability of the CPI clauses: "Assuming, *arguendo*, that the basic contract service fees and the CPI increase are determined to be reasonable, we agree with [Waste Management] that it will be entitled to recover the CPI increase from Essex unhampered by [the ban on retroactive ratemaking"]. If a policy hostile to CPI adjusters actually existed, then the BPU should have articulated that policy in the February 1989 order.

Finally, the SWTR contract did not provide for "annual increases" as misstated by the Appellate Division. It provided for annual adjustments to the base rate according to a formula that allowed for the rate to be adjusted at 106 percent of the CPI for the eleven-month period from January through November of the preceding year.[5] Although the parties have called the SWTR term an "annual increase," and the Appellate Division followed suit, SWTR's price would have actually decreased in the event of deflation. Can there be any doubt that the SWTR contract would have been approved by the BPU in August 1991 if there had been deflation in 1988 and 1989? *See Duquesne Light*, 488 U.S. at 315 (1989) (regulation that "required investors to bear the risk of bad investments at some times while denying the benefit of good investments at others would raise serious constitutional questions."). This is the danger posed when the regulator arrogates the right to decide, after performance, whether an inflationary-linked adjuster can be enforced.

III

THE STATE'S SELECTIVE REFUSAL TO ENFORCE THE SWTR CPI-LINKED ADJUSTER IS UNCONSTITUTIONAL

In violation of its rights to due process and equal protection, SWTR has received disparate treatment at the hands of

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[5] This approximates an adjustment of 100 percent of the CPI for a twelve-month period and allowed the County to know in advance of the new year what the rate would be as of the following August 1.

the state. No rational basis has ever been articulated for this disparity of treatment. While the state talks of "well established" policy generally barring enforcement of inflation-linked adjusters, its actions speak louder than its words. In *In the Matter of the Petition of the Union County Utilities Authority*, Docket No. CT05593003 (January 14, 1994) (Appendix "F"), the DEP accepted the contract between the Union County Utilities Authority and a vendor that included a CPI-linked adjuster. This occurred seven months before the DEP's reaffirmation of the BPU's rejection of the CPI in this case based on alleged well established policy. The state has sought to distinguish this case from the Union County case by suggesting that the CPI adjuster in that case passed muster because any increase was capped by four percent. This is not a rational distinction. SWTR has suggested that its increases could have been likewise capped at four percent, but the state has insisted on a total forfeiture of SWTR's CPI clause.

In *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984 (October 21, 1987) (Appendix "G"), the state approved Gloucester County's contract with a resource recovery facility that included annual adjustments in accordance with the Producer Price Index ("PPI"). The state's distinction is that the PPI was permitted in that case because there is a nexus between the cost components of a resource recovery facility and the PPI. Initially, this is a revisionist spin on the decision nowhere evident in the BPU's actual text. It was first advanced years later as the pretext to deny SWTR the right to enforce its inflation-linked escalators. In any event the state's distinction is pure fiction. The PPI is a Bureau of Labor statistic measuring changes in wholesale prices "received by domestic producers of commodities in all stages of processing." *Bataco Industries, Inc. v. United States of America*, 29 Fed.Cl. 318, 319 (Claims Court 1993). The SES Gloucester facility is a resource recovery plant that collects solid waste and burns it. It is neither a user of unfinished goods or commodities, nor obviously the producer of goods or commodities.

The state argues that in *SES Gloucester* it permitted the inflation-linked adjuster, but coupled with an on-going earnings analysis. SWTR has argued that its CPI adjusters could likewise be approved coupled with an on-going earnings analysis. The state declined to accept this proposal.

Perhaps the disparity of treatment between SWTR and other vendors is best underscored by the BPU's decision in *In the Matter of the Application of Passaic County Utilities Authority*, BPU Docket No. S08704360 (October 26, 1987) (Appendix "H"). In that case, the BPU approved the Passaic County transfer station contracts, inclusive of annual automatic increases, simply because they were negotiated at arm's length in a competitive market. This is the case that should guide, because SWTR's contract was likewise negotiated competitively. The state has never offered any distinction between these two cases.

When push comes to shove, the respondents will be unable to cite to this Court even one other case where the state excised an inflation-linked adjuster from a utility contract under its jurisdiction. There is no policy in New Jersey barring inflation-linked adjusters, and there was no rational basis for it deny SWTR the right to enforce a clause that similarly situated parties routinely enforce. What clouded the proceedings below was the arbitrary political influence of Newark, not valid public policy.

CONCLUSION

Throughout this petition, SWTR actively sought to avoid hyperbole, but the degree to which the state has ignored its constitutional rights is shocking. The state cannot legally regulate SWTR into deficit in the manner accomplished by the State of New Jersey. The state provided SWTR with no assurance of confidence in its financial soundness. It rescinded a material pricing term of the SWTR contract, but made no adjustment for this taking even though this action destroyed the value of the contract. The state fixed a rate for services insufficient for SWTR to even meet operating expenses -- expenses that the state had approved in their

entirety. It thus confiscated the investment in SWTR, leaving its investors to subsidize the County's costs for transfer station services. SWTR did not just receive a raw deal, it received an unconstitutional raw deal.

Even more shocking is that the New Jersey courts have turned a blind eye to these constitutional lapses. If the constitution of this nation is to continue to protect its citizens, then it must be enforced. No constitutional error is evident in the Appellate Division decision, but that is only because the court, like the regulators before it, ignored the facts underscoring the constitutional dimensions of this case. That does not make what occurred any less of a constitutional violation. In this land government cannot confiscate private investment. A clear constitutional violation occurred in this case. SWTR's right to relief must be worth more than expedient political solutions.

For the reasons express in this Petition, SWTR respectfully requests that this Court issue a writ of certiorari to review the Appellate Division's decision, that it reverse that court's determination, and that it remand for entry of a judgment in favor of SWTR in the amount of $3,427,493, plus lawful interest.

Respectfully submitted,

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